Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-746

LEWIS E. JOHNSON,
*Petitioner,*

versus

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

The petitioner, Lewis E. Johnson, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which was rendered on September 1, 1977, and entered on October 17, 1977, following the denial of a timely Petition for Rehearing and Petition for Rehearing en banc.

## OPINIONS BELOW

There are no written opinions, and only one written order, by the District Court which relate to the points raised by this petition.

The opinion of the Court of Appeals for the Fifth Circuit, reported at 558 F.2d 744, is annexed hereto in the Appendix at pp. 2a-8a.

## JURISDICTION

This is a criminal prosecution which was initiated in the United States District Court for the Eastern District of Louisiana. Petitioner was convicted of three counts of violation of 26 U.S.C. §7206(1) relative to making and subscribing false and fraudulent corporate tax returns for two corporations which he owned. Each of the points of this petition were raised in the initial proceedings before the District Court and upon the appeal before the Court below. On September 1, 1977, the Court below entered a judgment affirming the judgment of conviction. Appendix at p. 1a. On October 17, 1977, the Court below denied a Petition for Rehearing and Petition for Rehearing En Banc which had been timely filed in the said Court. Appendix at pp. 9a-10a. On November 2, 1977, the Court below granted a stay of the issuance of its mandate to and including November 16, 1977, which stay is to remain in effect during the pendency of this petition before this Honorable Court if, during the period of the said stay, the Clerk of this Honorable Court notifies the Clerk of the Fifth Circuit Court of Appeals that this petition has been filed.



The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

During the week prior to the commencement of the trial of this cause, when the venire from which a petit jury was to be selected for the trial of this case, the defense conducted an investigation of the prospective jurors within the means possible to it without violating the law or legal ethics. The defense determined that none of the prospective jurors for the trial of this cause were sole proprietors of their own business. This provoked further inquiry by defense counsel. It was discovered that the local plan for the selection of Federal juries in the Eastern District of Louisiana permitted a personal exemption of operators of so-called one-man businesses. Further inquiry demonstrated that this personal exemption was extended to sole proprietors who had employees in their businesses. On the Friday preceding the commencement of this trial on the following Monday, the defense filed a Motion to Dismiss Indictment and to Quash General Venire. (Doc. No. 57, Record on Appeal Vol. II) On the day the said motion was filed, a proposed Order was tendered to the Court for the special setting of this motion for hearing prior to the commencement of the trial. The District Court held that the issues raised by the motion were insubstantial, that no hearing was therefore necessary, and denied defendant's motion without a hearing. On the following Monday, prior to the commencement of the trial, defense counsel orally moved to proffer evidence at a later date in support of the motion to dismiss and to quash the general venire. The District Court denied

that request. (Doc. No. 64, Record on Appeal Vol. II.) Following the trial and conviction of defendant on the corporate tax returns counts, the defense filed a motion for a new trial, attaching a number of forms obtained from the Jury Commissioner, an affidavit by one of defense counsel's associates with respect to an interview of the Jury Commissioner, and a letter from Mr. Joseph N. Traigle, Collector of Revenue for the State of Louisiana, in which the number of sole proprietorships in the several parishes comprising the Eastern District of Louisiana was stated to be 46,-200. A hearing was requested in which evidence would be allowed to refute certain factual conclusions made by the United States Court of Appeals for the Fifth Circuit in *United States v. Horton*, 526 F.2d 884 (5 Cir.), *cert. den.* 429 U.S. 820 (1976). The District Court denied the request for an evidentiary hearing and the motion for a new trial. The Court of Appeals held that this issue did not even warrant further discussion in view of its opinion in the *Horton* case. 526 F.2d at 884 n.3.

Petitioner is a wealthy businessman who owns several closely held corporations and sole proprietorships. He has several employees to perform various functions within these various businesses. Only one employee, Mr. Wayne Mason, is involved in all of these businesses. He is petitioner's bookkeeper. While he is responsible for certain administrative functions of petitioner's business, he is not empowered to make policy decisions. Therefore, the direction of petitioner's businesses was truly a one-man function. He is a member of the class of persons who are granted a personal exemption and who, by virtue of the operation of this system of exemption, are excluded from jury service.



## I.

1. The first question presented is whether the operation of the personal exemption practices in the Eastern District of Louisiana, which in effect solicits the owners or operators of one-man businesses and sole proprietorships to exercise a personal exemption from jury duty, works to systematically exclude a substantial identifiable class of persons from jury service and thereby denies due process of law to persons tried by juries from which such class has been excluded?

2. The second question presented is whether defendant is a member of the excluded class and was thus denied equal protection of the laws by virtue of the excusal of members of his class from jury duty upon the basis of their exercise of a personal exemption?

3. The third question presented is whether the doctrine of *stare decisis* may be applied to deny a person an evidentiary hearing to establish the factual error of certain basic factual conclusions upon which a precedent is based and then to affirm the judgment based upon the application of that doctrine when it is obvious that the exhibits annexed to the moving papers tends to, if it does not clearly, refute the factual basis for the erroneous precedent, in this case, *United States v. Horton, supra.*

## II.

A series of rulings by the District Court and the closing argument of the Government cast petitioner in a prejudicial light and depicted him as a tax evader. The Government, over objection by the defense, was permitted by the District Court to point to a number of

items which had been misreported or misclassified or omitted from petitioner's tax returns and which inferred a tax liability on the petitioner's part. The petitioner had hired a prominent local accounting firm to handle all of the accounting details of his business and to prepare his several tax returns. These accountants, in preparing petitioner's tax returns, had missed items of deductions which would have eliminated any tax liability on petitioner's part at all. Petitioner, in reviewing the tax returns before signing them, failed to notice the omission of these major deductible items just as he missed the relatively minor items of income and the classification of income and expenses which his accountants had made on the tax returns. The Government, at the commencement of this trial, dropped all charges which would put in issue the question of tax liability on the part of the petitioners — or so it thought and the District Court so ruled. But petitioner, after these charges were dropped, contended that these items of missed deductions and items misclassified as income were probative to his defense of good faith reliance upon his accountants. The rulings of the District Court precluded petitioner from erasing from the minds of the jurors the prejudice to his case which occurred from his having been portrayed as a millionaire tax evader to the jurors of much less substantial financial condition. Having not been allowed to adduce evidence disproving a tax liability through the Government witnesses (his bookkeeper and several accountants), the defense attempted to cross-examine the Government IRS agents to demonstrate that certain items of omitted deduction would offset any apparent tax liability. Since the Government had carefully skirted these issues so not to bring them within the scope of its



direct examination, it objected to and was sustained in its effort to prevent the adducement of this evidence. Throughout the cross-examination of the Government witnesses, each time the defense would get into areas damaging to the Government's case, or to its implanted inference of tax liability, the Government would object and be sustained that the cross-examination was impermissible because it exceeded the scope of the direct examination in violation of Rule 611(b), F.R.Evid. Having thus avoided the adducement of evidence to refute the carefully laid inference of tax evasion, the prosecutor was able to argue without evidential refutation that improper deductions were made by petitioner "at the expense of the taxpayers of this country." The Court of Appeals "[did] not agree that this expression implied a tax liability." ____ F.2d at ____. It, however, offered no explanation as to how it might otherwise have reasonably been interpreted. With regard to the issue of the relevance of the issue of missed or misclassified items of deduction, while agreeing that such evidence would ordinarily be probative to the defense of reliance upon the accountants, concluded that such evidence could not have had an appreciable impact upon the jury "because much of the prosecution's evidence demonstrated that Johnson withheld relevant information from his accountants." ____ F.2d at ____. Again, the Court of Appeals cited no example of any such evidence. The accountants who were responsible for petitioner's account testified that they undertook the obligation to trace down and properly classify items affecting petitioner's tax liability and that all of petitioner's records were available to them. They had preferences for particular records and did not examine all of the records which were available to them.

1. The first question presented with regard to these circumstances is whether the failure to make permissible deductions, resulting in a tax overpayment, is probative evidence in support of the defense of good faith reliance upon one's accountants in the preparation of income tax returns.

2. The second question presented is whether any improper prejudice could have been suffered by the Government had this evidence been admitted, and, if so, whether such prejudice substantially outweighed the probative value of the excluded evidence.

3. The third question in respect to these issues is whether the Court of Appeals' determination that this excluded evidence could have had no appreciable impact upon the jury was factually or legally correct.

4. The fourth question with regard to the issues relative to the reliance defense is whether the District Court improperly and unequally applied Rule 611(b), F.R.Evid., to keep out probative and necessary evidence of good faith reliance while permitting the Government full range of cross-examination, irrespective of the said Rule, under the supposed distinctive guise that the Government's cross-examination was permissible to prove the bias and interest of the defense witnesses.

5. The final question regarding the excluded evidence of tax overpayment by virtue of omission of deductible items is whether the District Court should have declared a mistrial after having prevented the defense from adducing evidence of substantial omissions of tax deductible items which would have



proven tax overpayment the prosecutor inferred that petitioner had a tax liability when it argued that the taking of improper business deductions by petitioner were made "at the expense of the taxpayers of this country."

## CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED

The issues presented by this petition involve the provisions of the Fifth and Sixth Amendments to the United States Constitution, 26 U.S.C. §7206(1), Rules 403 and 611(b), Federal Rules of Evidence, and the Random Plan for the Selection of Juries in the United States District Court for the Eastern District of Louisiana. Pertinent portions of the said provisions are copied in the Appendix at pp. 16a-20a.

## STATEMENT

This is a criminal proceeding arising in the United States District Court for the Eastern District of Louisiana. On August 25, 1975, a federal grand jury indicted petitioner, charging him with violations of the Internal Revenue laws of the United States. Counts 1 and 3 of the indictment charged him with evasion of personal income taxes for the calendar years 1971 and 1972. Counts 2 and 4 charged him with making false and fraudulent statements with regard to his personal income taxes for those same years. Count 5 charged him with making and subscribing a false and fraudulent Corporate Income Tax Return for Hendee Homes, Inc., for fiscal year ended (FYE) May 31, 1972. Counts 6 and 7 similarly charged him with regard to the corporate return of Tel Enterprises, Inc., for FYE

May 31, 1971 and May 31, 1972. Prior to trial the Government dropped the charges in Counts 1-3. Petitioner was acquitted with regard to his personal tax return (Count 4). He was convicted on the charges made in Counts 5-7 relative to the corporate tax returns of Hendee Homes, Inc. (Hendee) and Tel Enterprises, Inc. (Tel). Petitioner appealed the judgment with respect to the three corporate tax returns. The Court of Appeals for the Fifth Circuit affirmed the judgment on September 1, 1977. A timely petition for rehearing was denied on October 17, 1977. For reasons stated in a motion addressed to Mr. Justice Powell, as Circuit Justice for the Fifth Judicial Circuit, counsel was unable to prepare and file this petition on or before November 16, 1977, and has been granted until November 26, 1977, to timely file same.

The two major classifications into which the assignments of error have been divided in this petition arose in the following way.

During the week preceding the trial, the venire of prospective jurors was published. Defense counsel obtained a copy of that document and began researching the background of the prospective jurors in order better to enable him to exercise peremptory challenges as well as to determine if there was cause for the challenge of any of the said prospective jurors. Defense counsel learned that no person on the list of prospective jurors was similarly situated to the defendant. There were no sole proprietors of small businesses, or large ones for that matter, who would have to rely upon accountants for the preparation of their tax returns. This discovery stimulated inquiry into the reason for the absence of such people from the



prospective jury venire. Defense counsel ascertained that it was because the Plan for the Random Selection of Jurors for the Eastern District of Louisiana provided a personal exemption to persons of petitioner's economic and business class. Petitioner then moved the Court below to dismiss the indictment and to quash the general venire, as follows (R. Doc. 57):

> Defendant, Lewis E. Johnson, through his undersigned counsel, respectfully moves this Honorable Court to dismiss the indictment and to quash the general venire for the reasons and on the grounds that the personal exemption granted prospective grand jurors and petit jurors who are owners of one-man businesses works an unconstitutional discrimination against persons similarly situated with defendant, *i.e.*, sole proprietors of one or more businesses, as well as violates the constitutional requirement that such juries be randomly drawn from a general venire which is fairly representative of a cross-section of the community, from which no substantial identifiable segment has been arbitrarily excluded.

Petitioner prayed that a hearing be conducted on this motion, after which the indictment would be dismissed, the general venire quashed, and a new general venire empanelled which would be composed of all identifiable groups within the community, with no personal exemption accorded to anyone on the basis of economic considerations or conditions. (*Ibid.*) The District Court determined that the issues raised by this motion were not substantial and denied a hear-

ing. (R. Doc. 57, p. 2.) The trial was commenced the following Monday, at which time the Court orally denied the said motion. (R. Doc. 64) Petitioner then moved for leave to proffer evidence at a later date with reference to the motion, which motion was denied. (*Ibid.*) Following the trial, petitioner moved for a new trial (R. Doc. 83a) and for an evidentiary hearing with respect to that motion (R. Doc. 83b) Paragraph 1 of the Motion for a New Trial stated:

> 1. The Plan for Random Selection of Grand and Petit Jurors for the Eastern District of Louisiana, on its face and as applied to the general venire from which the petit jury in this case was drawn, operated in an unconstitutionally discriminatory fashion to deny defendant equal protection of the laws by virtue of the systematic exclusion of persons who own and operate their own businesses, as defendant does, and who have similar tax problems as defendant. In a tax case, especially, where the exclusion of an entire economic class results in the absence of persons on the jury who have tax problems similar to the defendant, the exclusion of sole proprietors is so obviously a denial of equal protection of the laws that the interests of justice and the orderly expedition of pending litigation against the defendant require that a new trial be accorded.

The following was stated in the motion for an evidentiary hearing in connection with the motion for a new trial (R. Doc. 83b):



> 1. A letter, not yet in the record, written to undersigned counsel by Mr. Joseph N. Traigle, Collector of Revenue for the State of Louisiana, demonstrates that there are an estimated 46,200 sole proprietorships in the Eastern District of Louisiana. Further evidence may be adduced in connection with or in support of the disclosures made in the said letter.
>
> 2. A telephone conversation had with Mrs. Janice K. Barden, Jury Commissioner for the Eastern District of Louisiana, disclosed that the "one-man business" personal exemption is the most exercised personal exemption under the Plan for the Random Selection of Grand and Petit Jurors for the Eastern District of Louisiana. It is urged that, contrary to the unsubstantiated declaration of fact by the Fifth Circuit Court of Appeals in *United States v. Horton*, 526 F.2d 884, 889 (5 Cir. 1976) that the exclusion of sole proprietors is not automatic, the effect of the letter sent by the Clerk of Court advising prospective jurors that they "will be excused by the Court upon individual request" if they are a person "actively engaged in operating a one-man business" and the practice of excusing all sole proprietors who make the request (which is practically if not all such persons) is to influence sole proprietors to take a personal exemption from jury service. The letter from the Clerk and the records reflecting the persons who were excused and the reasons therefore are not in the record by virtue of the refusal to grant defen-

> dant a hearing on his previously filed Motion to Dismiss Indictment. A hearing is necessary to introduce such evidence for examination by this Court and/or for ultimate examination by the Court of Appeals.

An affidavit, submitted with the above two motions, demonstrated that the Jury Commissioner for the Eastern District of Louisiana, a statistician, had taken samplings for statistical analysis with respect to the Master Jury Wheel of 1970 and 1973 and statistically revealed that 2.8% of the 500 names which were drawn from the 1970 wheel and statistically studied were exempted from jury service under the "one-man business" personal exemption, and that 4% were exempted under the said exemption with regard to the 1973 Master Jury Wheel. The form letter sent by the Clerk to prospective jurors and the Juror Qualification Questionnaire were annexed to the Motion for a New Trial. (R. Doc. 83a-b.) The letter from Mr. Traigle, State Collector of Revenue, was also annexed to the said motion. (*Ibid.*) The Government opposed petitioner's Motion for a New Trial (R. Doc. 93) and the Motion for an Evidentiary Hearing (R. Doc. 91). The District Court denied both of those motions, permitting only argument and without an evidentiary hearing on May 12, 1976. (R. Doc. 95) The denial of the pre-trial motions to dismiss, to quash the general venire and for an evidentiary hearing, as well as the opportunity to make a proffer in support of the motion was made the basis of the Fourth Issue Presented in the Appellant's Brief in the Court Below. The denial of the Motion for a New Trial and the Motion for an Evidentiary Hearing was made the basis of the Fourteenth Issue Presented on the direct appeal to the Court below. The Court of



Appeals disposed of these substantial issues on the appeal of this case in the following language (558 F.2d at 747 n.3 and accompanying text):

> We have carefully examined Johnson's 12 other allegations of error and find them to be without merit.[3]

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3 These assignments of error are as follows: * * * (4) The trial court denied appellant's motion to quash the general venire, to dismiss the indictment, and to proffer evidence in support of the motion [We had already decided this issue in *United States v. Horton*, 526 F.2d 884 (5th Cir. 1976), *cert. den.*, 429 U.S. 820 * * *]; * * * (12) The trial court overruled appellant's motion for a new trial.

No attempt by the Court below was made to review or harmonize the evidence annexed to petitioner's motion for a new trial with the assumptions of fact made by it in the *Horton* case. (*Ibid.*)

The primary defense in this case was that petitioner, in good faith, relied upon his accountants to properly classify and report items of income as well as deductible items. Such a defense would be complete against a charge of 26 U.S.C. §7206(1), since wilfulness of the misstatement is an essential element of the offense. On numerous occasions, and by a specific declaration as to what it would allow, the District Court prevented petitioner from adducing evidence which would have shown that his accountants missed items of deduction

as well as items of income. The Court's prevention of the adducement of such evidence was apparently based upon the concept that, after the dismissal of Counts 1-3 of the indictment this evidence was irrelevant and, under Rule 403 of the Federal Rules of Evidence, was inadmissible even if relevant because its probative value was outweighed by its potential prejudicial effect. Regarding this basis for rejecting petitioner's claim of prejudicial error, the Court below wrote (558 F.2d at ____):

> The irrelevancy of Johnson's alleged overpayment of tax to any issue at this trial is firmly established by cases in this and other Circuits. We held the following in *Schepps v. United States*, 395 F.2d 749 (5 Cir. 1968), *cert. den.*, 393 U.S. 925:
>
> The appellant has been found guilty, in two counts, of violating 26 U.S.C. §7206(1), wilfully making and subscribing a federal income tax return which he did not believe to be true and correct as to every material matter. That the return was false in certain particulars is not disputed. Although not charged with nor being tried for income tax evasion, appellant says that he should have been allowed to introduce proof showing that the falsity resulted in no tax deficiency. This proof was not relevant to the issue raised by the indictment and it was not error to reject it, *Siravo v. United States*, 1 Cir., 1967, 377 F.2d 469; *Silverstein v. United States*, 1 Cir. 1967, 377 F. 2d 269; *Hoover v. United States*, 5 Cir. 1966, 358 F.2d 87, 89, *cert. den.*, 385 U.S. 822.



See also *United States v. Fritz*, 481 F.2d 644 (9 Cir. 1973); *United States v. Jernigan*, 411 F.2d 471 (5 Cir. 1969), *cert. den.*, 396 U.S. 927.

These precedents notwithstanding, Johnson raises two objections to the district court's refusal to allow evidence of income tax overpayment. First, Johnson contends that such evidence was relevant in his case to the issue of whether he in good faith relied on his accountants properly to compute and classify reportable items of income and expense. He argues that:

> Had the appellant not left the accounting procedures to his accountants and trusted their computations, surely some of the deductible items which would have reduced Appellant's tax liability would have been picked up by him when he examined his returns.

Brief for Appellant at 39.

> We agree that the failure to make permissible deductions, resulting in a tax overpayment, logically tends to prove reliance on the integrity and expertise of one's accountants. Although this evidence might thus have aided the reliance aspect of Johnson's defense, it could have had no appreciable impact on the case as a whole because much of the prosecution's evidence demonstrated that

Johnson withheld relevant information from his accountants. Under these circumstances, Johnson's alleged reliance on his accountants is irrelevant. *Cf. United States v. Signer*, 482 F.2d 394, 398 (6 Cir. 1973).

Even if we assume that reliance evidence is logically relevant to any issue in the case, our inquiry cannot end there. Under Federal Rule of Evidence 403, admissibility is predicated on more than mere logical relevance:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In determining legal relevance, the trial judge has broad discretion. *United States v. Moore*, 522 F.2d 1068, 1079 (9 Cir. 1975), cert. den., 423 U.S. 1049 (1976). We may not disturb his ruling unless he has clearly abused his discretion. *United States v. Dwyer*, 539 F.2d 924, 927 (2 Cir. 1976).

No showing of abuse of discretion has been made here. Where reliance on the accountants was relevant, the district court allowed direct evidence on that point. Because it depends on a series of inferences, however, evidence of neglected deductions is only indirectly probative of reliance. Moreover, it carries several risks against which Rule 403 was designed to



> protect. It could have resulted in unfair prejudice to the government's case by appealing to the emotions of the jury. Indeed, the conduct of Johnson's counsel during the trial made this no small concern of the district court (Footnote omitted.) Also, the danger of confusing the issues was great because tax liability was irrelevant to the offenses for which Johnson was tried. Finally, presenting evidence of over payment could have resulted in a waste of time on collateral issues. See 1st Supp. Record, Vol. III, at 308. We conclude that the district court properly excluded evidence of neglected tax deductions.

The second ground urged in the Court below to sustain petitioner's claim that the exclusion of evidence of substantial omitted deductions constituted reversible prejudicial error was that, by denying the petitioner the opportunity to adduce such evidence, the prosecutor was enabled to argue to the jury that improper business deductions were made "at the expense of the taxpayers of this country." Tr. Pros. Arg. at 22. Petitioner argued that the quoted comment implied, if it was not explicit, that petitioner had a tax liability or deficiency as a direct result of the omission of certain items of reportable income. Petitioner moved for a mistrial on account of that statement. On the appeal, the Court below said: "We do not agree that this expression implies a tax liability. But, however it is interpreted, any prejudicial effect that it might have had was cured by the district court's instruction to the jury: whether 'a tax is due or owing by the defendant is immaterial to the charges before you in this case'." The Court below quoted the remainder of the district court's charge at that time, as follows:

> Accordingly, whether the Government has or has not suffered a pecuniary loss or monetary loss as a result of the alleged false return is not relevant and need not be considered by you in your deliberation. (Footnote omitted.)

Petitioner, having been denied the opportunity to refute just such an assumption as that which surfaced in the argument (and which had laid just below the surface throughout this trial of a millionaire plumber on charges of tax fraud), did not have the prejudicial effect of the comment removed. The jury was not told that petitioner had no tax liability. It was not told that petitioner had been prohibited from proving that he had no such liability.

## REASONS FOR GRANTING THE WRIT

### 1. Reasons for Granting the Writ with Respect to the Issue of Systematic Exclusion of Petitioner's Class from the General Venire and With Respect to the Denial of an Evidentiary Hearing.

Rule 19(1)(b), Rules of the Supreme Court of the United States, provides, in relevant part, as follows:

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> * * * *



> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; * * * or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

We respectfully submit that this case presents a clear case meeting each of the above-quoted examples of the proper exercise by this Honorable Court's discretion to grant a writ of certiorari to review the judgment of a Court of Appeals. This first issue of the petition warrants plenary review by this Honorable Court and a reversal of the judgment below for the following reasons.

A. The judgment in this case is irreconcilable with the decision of another Panel of the Fifth Circuit in a State case, *Labat v. Bennett*, 365 F.2d 698 (5 Cir. 1966), and with the principles announced by this Court in *Peters v. Kiff*, 407 U.S. 493 (1962), as well as other cases.

In *Labat v. Bennett, supra*, a Panel of the Fifth Circuit Court of Appeals, in a case arising on a petition for habeas corpus relief, held that a system of exclusion of prospective jurors who exercised a personal exemption as a "daily wage earner" denied equal protection of the laws to members of the excluded

class who were indicted and put to trial before a jury drawn from a general venire from which members of their economic class were excluded. The present case presents the opposite side of the same coin. By excluding from jury service persons who are sole proprietors working in their own businesses, in a case in which the accused is a member of the excluded class, the same legal principles are involved.

It is conceded that a daily wage earner might not suffer as great a loss as would the owner of a business who had to be away from it in order to serve on the jury. But by the same token, he could much better afford to contribute his civic service than could the daily wage earner who is, under the teaching of the *Labat* case, forced to render such service. People of greater means, especially those who own and run their own businesses, should not be accorded special privileges over people of lesser means when it comes to the duty to render civic duties such as jury service. Moreover, if such persons are permitted to escape jury duty in a case involving another member of their economic class, then the sole proprietor tried before such a jury stands in the same position as State-tried daily wage earners formerly stood. We submit it is both ironic and incomprehensible that the Fifth Circuit would have taken different views in these similar types of cases. Perhaps the law's recent concern for the impoverished has resulted in a subconscious effort to see that the wealthy are not accorded special privileges. We would not quarrel with such an attitude. But we do urge that it would be improper to refuse to apply the law equally in the case of both poor and wealthy men. The Court below has not done that and, by not having done so, it has itself departed, as well as it has sanctioned the



departure by the lower court, from the usual and accepted principles of justice which lie at the foundation of our American system of legal justice for all.

The exclusion of members of petitioner's class from jury service not only violates equal protection but due process principles of constitutional law. In *Peters v. Kiff, supra*, this Court held that due process of law is denied if any substantial identifiable segment of the community is excluded from jury service. This Court held that a person need not be a member of the excluded class in order to invoke the requirement that no class be excluded from jury service. There has been some contention in the lower courts that petitioner is not the operator of a "one-man business" within the meaning of the Plan for the Random Selection of Grand and Petit Jurors for the Eastern District of Louisiana. Had the District Court granted the requested evidentiary hearing, we could have shown (1) that the personal exemption is accorded "sole proprietors" and not just owners of "one-man businesses" who had no employees [*See* ¶ 5 of the affidavit annexed to petitioner's motion for a new trial, R. Doc. 83(a)]; (2) that sole proprietors are virtually invited to claim an exemption and that, even if one should infrequently not do so, the availability of a substantial number of such prospective jurors would be substantially reduced by operation of the system employed; and (3) that the persons exempted from jury service under the "one-man business" exemption form a substantial identifiable segment of the community which is systematically excluded from grand and petit juries in the Eastern District of Louisiana. Therefore, it was not necessary that petitioner be a member of the excluded

class before he had standing to complain of the exclusion.

B. The Fifth Circuit has decided an important question of Federal law which has not been, but which should be, decided by this Court.

In *United States v. Horton*, 526 F.2d 884 (5 Cir.), *cert. den.*, 429 U.S. 820 (1976), the Fifth Circuit decided that "the exclusion of sole proprietors is not automatic. On the contrary, it is necessary for such persons to request that they be excused from jury duty." 526 F.2d at 889. Unlike its decision in *Labat v. Bennett, supra*, the Fifth Circuit seemed to say that a system of personal exemption, rather than statutory disqualification, is an insufficient basis for establishing an improper class exclusion on the grand or petit jury. As pointed out in the Motion for an Evidentiary Hearing, the "one-man business" personal exemption is the most exercised personal exemption under the Plan for the Random Selection of Grand and Petit Jurors for the Eastern District of Louisiana. (R. Doc. 83(b), ¶ 2) The fact that a prospective juror must claim the exemption has no legal significance. If he is automatically excluded upon his claim of exemption, then due process is violated if the basis for the exclusion is improper. We submit that there is no greater basis for excluding the owners of one-man businesses than there is for excluding daily wage earners who have even less means for their support than do sole proprietors. This Court should accept this case for review upon a petition for writ of certiorari, following which it should declare that the system of personal exemptions granted members of the excluded class violates due process



and, in the case of one such as petitioner who is a member of the excluded class, it also violates the provisions assuring equal protection of the laws.

C. The question presented should also be considered by this Honorable Court by virtue of the recurring nature of the objection to juries from which this class of persons has been excluded by operation of the exemption granted by the Plan for Random Selection of Grand and Petit Jurors for the Eastern District of Louisiana. No attempt has been made to ascertain how many Districts other than the Eastern District of Louisiana have provided for the exemption herein assailed. The Eastern District of Louisiana appears to be the only District from which an appeal of this issue has been taken. But with the federal crackdown on the so-called "white-collar crimes" which now appears to be in vogue, it is obvious that the issue will be one of a recurring nature. No lawyer who is defending a businessman against charges of "white collar crime" could justify not challenging a system of jury selection which excluded from jury service the very economic class most likely to understand his positions. Moreover, the defendant in a white collar crime is often a member of the class excluded by the operation of the personal exemption system herein challenged. A businessman is most qualified to judge what constitutes ordinary business practices and, for that reason, their absence on juries selected to try such alleged offenses is especially conspicuous to both the lawyer and the client. This absence should be prohibited by this Honorable Court in the same spirit that it has acted to preserve and protect the rights of the impoverished and others against whom class discriminations inherently lie. A businessman tried

before a jury of non-businessmen is certainly in the position of being tried before a class of persons who inherently discriminate against him.

D. The denial of a hearing, when the petitioner offered to refute with evidence the factual assumptions made in the *Horton* case, seems clearly to be a departure from sanctioned judicial procedures. The doctrine of *stare decisis* yields to new evidence which refutes the foundation for the past precedent. The *Horton* case was not supported by the type of evidence which petitioner herein sought to adduce. Petitioner should have been accorded the opportunity to prove the *Horton* decision was incorrect.

E. For the foregoing reasons, the writ should be granted to review this element of the decision below. The difference in the record below distinguishes this case from the case which was presented to this Honorable Court in *Horton v. United States*, 429 U.S. 820 (1976). We respectfully submit that the exhibits annexed to the Motion for New Trial are wholly adequate to justify this Honorable Court in reviewing this issue on the merits and concluding that petitioner was denied due process and equal protection of the laws. If this Court should not agree, then at the very least this Honorable Court should remand this case to the District Court for a hearing and it should maintain jurisdiction over this case to review the factual findings of the district court.

2. **Reasons for Granting the Writ with Respect to the Exclusion of Evidence of Omitted Tax Deductible Items in Support of the Defense of Reliance Upon One's Accountants.**



The Court below "agree[d] that the failure to make permissible deductions, resulting in a tax overpayment, logically tends to prove reliance on the integrity and expertise of one's accountants." But the Court held that the excluded evidence "could have had no appreciable impact on the case as a whole because much of the prosecution's evidence demonstrated that Johnson withheld relevant information from his accountants." The Court below, from this interpretation of the evidence, concluded that the defense of reliance, hence the evidence sought to be adduced in its support, was irrelevant.

We respectfully challenge the finding by the Court below that "much" of the prosecutor's evidence demonstrated that Johnson withheld relevant information from his accountants. Had the Court said that "some" of the evidence tended to show that, we would not quibble. But the jury would then have been the one to determine the impact of the omitted deductions upon the reliance defense, not the Court of Appeals. The source of the evidence to which the Court below referred was an accountant who now works for the Department of Agriculture, who worked for the firm of accountants which was responsible for keeping petitioner's accounts and for preparing his tax returns. Petitioner's bookkeeper testified that petitioner told him to classify certain political campaign contributions as "campaign" expenses and that the bookkeeper classified them as "sales campaign" expenses of Hendee Homes, Inc. But that same witness testified that when he learned they were political campaign expenses he started so labeling them on the ledgers. The person who reclassified these expenses was petitioner's own employee. The accounts were all

available to the accountants as the testimony of the Senior Accountant in charge of the accounts for petitioner demonstrates.

The firm of accountants was paid over $100,000 in a three-year period for keeping petitioner's accounts in order and for preparing his tax returns. That firm undertook the responsibility to trace all of petitioner's income and expenses and to properly report it. Together with the items of income which it failed to find and report, the said accounting firm omitted to report items of allowed tax deduction which would have offset any requirement for Hendee Homes, Inc. to have paid taxes at all for the FYE 1972. Other substantial deductible items were not allowed in evidence.

To refute the belief that "much" of the prosecution's evidence demonstrated withholding of relevant information from the accountants, petitioner needs refer only to the testimony of the Government witness, Mr. Gaudin, a senior accountant in the firm hired by petitioner. Mr. Gaudin was in charge of all of petitioner's accounts, although the senior partner in the firm, Mr. Duplantier, made the direct contacts with petitioner. The other accountants dealt principally with petitioner's bookkeeper.

Mr. Gaudin testified that his firm "rendered an opinion" on the Hendee Homes corporation, which involved an audit of that corporation. (1st Supp. Rec., Vol. 3, p. 24) He also audited Tel Enterprises. (*Id.*, at 23) Laurel Gardens was financed under the FHA 236 plan and required a certified audit and cost edification. (*Id.*, at 28). The CPA firm had access to all of petitioner's cancelled checks and check stubs (*Id.*, 29, 30), but it preferred to look to invoices in order to classify the



items of expense. (*Id.*, 31) There was a constant flowing of materials back and forth between petitioner's office and the accountants. (*Id.*, 32) In addition to the checking activity, the accountants went to banks and other lending institutions to obtain documentation upon which to properly account for the financial transactions in which petitioner was involved. (*Id.*, 32, 46) Mr. Gaudin assigned an accountant to scan the credit card purchases for personal expenses. (*Id.*, 47; see, also, Record on Appeal, Vol. III, pp. 23, 26) Mr. Behrent, instead of scanning the invoices, examined the check spread prepared by petitioner's bookkeeper. Even by this method, which undermined the system by which Mr. Gaudin undertook to establish all of petitioner's income, the accountant picked up substantial personal expenditures on credit card purchases which were then charged to petitioner as a wage. (1st Supp. Rec., Vol. III, p. 22-23, 25)

Petitioner's accountants were advised of every bank and other financial institution with which petitioner dealt. The same accountant who was to have examined the credit card invoices (but looked at the check spread) also was to have examined the accounts at the Citizens Homestead where petitioner earned $600 interest income. The accountant, who incidentally is the one who now works for the USDA, did not analyze the account and missed the interest income. (*Id.*, 46) This interest income was reflected only as an accounting transaction in the Homestead and by the IRS Form 1099 mailed to petitioner at the end of the year. Significantly, the accountants admitted they preferred analyzing the accounts rather than relying on 1099's. (*Id.*, 31) The record is replete with other examples of ineffective investigation or in breakdowns in the procedures established with respect to

petitioner's accounts. There is no evidence that petitioner was aware of the nature of the accountants' performance — or lack of it. We respectfully submit that the opinion of the Court below is clearly incorrect with regard to its determination that the defense of reliance was not adequately established by the evidence. The credibility of the sources of the supposedly contradictory views was strictly for a jury, and not the Court of Appeals, to assess the impact and weight to be accorded it. The defense was thus eviscerated by the rulings of the trial court, without legal justification.

The Court below took the alternative position that if the evidence was relevant to the issues of wilfulness and intent that Rule 403 of the Federal Rules of Evidence permitted its exclusion. We respectfully submit that this ruling of the Court below sanctioned such an abuse of discretion by the trial court that the supervisory jurisdiction of this Court is appropriately invoked.

We respectfully submit that Rule 403, F.R.Evid., is clearly inapplicable to this case and that, in the absence of its applicability, the exclusion of relevant evidence which "logically tend[ed] to prove reliance on the integrity and expertise of one's accountants" (____F.2d ____) is an abuse of discretion under Rule 402, F.R.Evid., which provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.



No discretion exists to exclude relevant evidence except that which is deemed inadmissible under the Constitution, laws or rules of the United States Supreme Court.

The Court below expressed concern that the admission of the evidence here at issue "could have resulted in unfair prejudice to the government's case by appealing to the emotions of the jury." ____F.2d ____. We respectfully submit that the petitioner was unfairly characterized as a tax evader, both in the absence of evidence to the contrary and by the prosecutor's comment in his closing argument that petitioner had made improper business deductions "at the expense of the taxpayers of this country," and that, if the evidence here in issue would have had any effect other than to prove good faith reliance upon the accounts, it would have served to dispel the prejudice suffered by petitioner.

Of course, if the Government would be deprived of its opportunity to prejudice petitioner by inference and innuendo, heightened by the denial of the opportunity to counter those false inferences, the Government's case (or at least its improper efforts) would be prejudiced. But the judgment below fails to consider that it is not "any" prejudice, only "unfair" prejudice, which authorizes the exercise of discretion to exclude relevant evidence. The exclusion, even then, must be predicated upon a balancing process in which it is determined that the danger of unfair prejudice outweighs the probative value of the relevant evidence. We feel that the Government would not have been "unfairly" prejudiced by the evidence. The omission of deductible items is just as probative of intent as

the omission of taxable items is. The mental assessment of intent is the same in either case.

The Committee's Notes following Rule 403, F.R.Evid., explain that "unfair prejudice" means an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." There was no attempt here to get the jury to decide the issue of intent upon some appeal to whatever emotion might have been aroused by evidence that petitioner owed no taxes. It is doubtful that such evidence could have provoked any emotional response at all, except to offset the prejudice inherent in a prosecution where a millionaire defendant is depicted as a tax evader.

The process of determining the admissibility of potentially prejudicial relevant evidence is a balancing process in which, in order properly to elect to exclude the evidence on that ground, the evidence must be so unfairly prejudicial to the opposing side that the prejudice clearly overshadows the probative value of the evidence. One of the primary elements in the balancing process is the determination of the question whether the prejudice could be overcome by cautionary instructions to the jury. In the language of the redactors of the Rule, "In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction." Committee's Note, IV *Moore's Federal Practice*, §403.01[3], p. IV-67; *Weinstein's Evidence* p. 403-3. The Court below felt that the prosecutor's comment that the taking of improper deductions by petitioner had been done "at the expense of the taxpayers of this



country" was cured by a district court's instruction to the jury. Even if this were so, which we doubt and strongly contest, it escapes us how such a charge to the jury could not have cured any prejudice to the Government by the allowance of this evidence.

The Court below also expressed its belief that the trial court's ruling was correct because the issue of tax liability was irrelevant to the offenses for which petitioner was being tried. But the issue of good faith reliance went to the proof of a lack of intent — one of the essential elements of the alleged crime. The "confusion of issues" was allowed to occur when the Government was allowed to suggest a tax liability on petitioner's part, indirectly by admitting evidence only of omitted taxable items and excluding omitted items of deduction, and directly when the prosecution argued that these improper deductions were made "at the expense of the taxpayers of this country." The admission of the excluded evidence would have clarified, rather than have confused, the issues by relieving the inherent prejudice resulting from the inferred motive of tax evasion for the alleged false reporting. The "confusion" and "misleading the jury" elements of Rule 403, F.R.Evid., are, for all intents and purposes, the same. *Weinstein's Evidence* §403[04].

As a final attempt to justify the trial court's ruling, the Court of Appeals said that "presenting evidence of overpayment could have resulted in a waste of time on collateral issues." ____F.2d at ____. The issue of intent is not "collateral." It is a necessary element of the offense. The defense has as much right to take the necessary time to negate proof of essential elements as the prosecution has to attempt to prove the ex-

istence of that essential element. The sources of this testimony, for the most part, were the same witnesses as those who were called on other points — principally Government witnesses. The adducement of this highly probative defensive evidence would have been neither a waste of time nor in reference to a collateral issue. Since the omissions and the fact of the income were not denied by the petitioner during the trial, the issue of intent was the central contested issue on this trial. The defense was virtually hamstrung by the rulings of the Trial Court which denied him the use of such probative evidence in support of his reliance defense which was warranted by the circumstances of this case.

For the foregoing reasons, this issue of the petition also warrants plenary consideration by this Honorable Court, after which the judgment below should be vacated and this cause remanded for a new trial.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES A. MC PHERSON
Attorney for Petitioner
419 Carondelet Street
New Orleans, Louisiana 70130
Telephone: [504] 581-1973



## CERTIFICATE OF SERVICE

I, James A. McPherson, Attorney for Lewis E. Johnson, petitioner herein, and a Member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of November, 1977, I served three copies of the foregoing Petition for a Writ of Certiorari on the Solicitor General of the United States, by mailing copies in a duly addressed envelope, airmail postage prepaid, to his office in the Justice Department in Washington, D.C.

All parties required to be served have been served.

JAMES A. MC PHERSON
Attorney for Petitioner
419 Carondelet Street
New Orleans, Louisiana 70130
Telephone: [504] 581-1973

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 76-2447

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D. C. Docket No. CR-75-524 "A" (I)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LEWIS E. JOHNSON,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

Before WISDOM, SIMPSON and TJOFLAT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

September 1, 1977

Issued as Mandate:

UNITED STATES of America,
Plaintiff-Appellee,

versus

Lewis E. JOHNSON,
Defendant-Appellant.

No. 76-2447.

United States Court of Appeals,
Fifth Circuit.

Sept. 1, 1977.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, SIMPSON and TJOFLAT, Circuit Judges.

SIMPSON, Circuit Judge:

Lewis E. Johnson was convicted on three counts of making and subscribing false and fraudulent corporate income tax returns for two corporations which he controlled. Title 26 U.S.C. § 7206(1) (1970). In appealing his conviction he has raised 14 arguments in favor of reversal. We find none of them meritorious and affirm. Two of the points raised on appeal warrant comment.

Both the original indictment and a superseding indictment to which Johnson pleaded not guilty and



went to trial contained seven counts charging violations of law as to income taxes. Counts I and III charged him with income tax evasion on his Individual Income Tax Returns, Forms 1040, for calendar years 1971 and 1972, in violation of Title 26, U.S.C. § 7201. Counts II and IV charged him with making false and fraudulent statements on his Individual Income Tax Returns for the same years, in violation of Title 26, U.S.C. § 7206(1). Counts V, VI and VII, on which Johnson was convicted, charged him with making and subscribing false and fraudulent corporate income tax returns, of corporations controlled by him, in violation of Title 26, U.S.C. § 7206(1). Prior to trial. on motion of the United States, the district court dismissed Counts I, II and III, thus removing the issue of tax evasion from the trial. The jury acquitted appellant as to Count IV.

Many of Johnson's objections to the fairness of his trial stem from the dismissal of the tax evasion charges because, he contends, he was thereby prevented from introducing evidence to establish that, during the period in question, he actually overpaid his taxes by neglecting to make permissible deductions. Because he was tried only for wilfully making false statements on his and his corporations' tax returns, his tax liability or overpayment was irrelevant. Johnson maintains that he was prejudiced because evidence submitted by the government led the jury to believe that he had underpaid his taxes and the trial judge would not allow him to counter this suggestion.

The irrelevancy of Johnson's alleged overpayment of tax to any issue at his trial if firmly established by cases in this and other Circuits. We held the following

in *Schepps v. United States*, 395 F.2d 749 (5th Cir. 1968), cert. denied, 393 U.S. 925, 89 S.Ct. 256, 21 L.Ed.2d 261:

> The appellant has been found guilty, in two counts, of violating 26 U.S.C., § 7206(1), wilfully making and subscribing a federal income tax return which he did not believe to be true and correct as to every material matter. That the return was false in certain particulars is not disputed. Although not charged with nor being tried for income tax evasion, appellant says that he should have been allowed to introduce proof showing that the falsity resulted in no tax deficiency. This proof was not relevant to the issue raised by the indictment and it was not error to reject it. *Siravo v. United States*, 1 Cir., 1967, 377 F.2d 469; *Silverstein v. United States*, 1 Cir., 1967, 377 F.2d 269; *Hoover v. United States*, 5 Cir., 1966, 358 F.2d 87, 89, cert. denied, 385 U.S. 822, 87 S.Ct. 50, 17 L.Ed.2d 59.

See also *United States v. Fritz*, 481 F.2d 644 (9th Cir. 1973); *United States v. Jernigan*, 411 F.2d 471 (5th Cir. 1969), cert. denied, 396 U.S. 927, 90 S.Ct. 262, 24 L.Ed.2d 225.

These precedents notwithstanding, Johnson raises two objections to the district court's refusal to allow evidence of income tax overpayment. First, Johnson contends that such evidence was relevant in his case to the issue of whether he in good faith relied on his accountants properly to compute and classify reportable items of income and expense. He argues that:



> Had the appellant not left the accounting procedures to his accountants and trusted their computations, surely some of the deductible items which would have reduced Appellant's tax liability would have been picked up by him when he examined his returns.

Brief for Appellant at 39.

We agree that the failure to make permissible deductions, resulting in a tax overpayment, logically tends to prove reliance on the integrity and expertise of one's accountants. Although this evidence might thus have aided the reliance aspect of Johnson's defense, it could have had no appreciable impact on the case as a whole because much of the prosecution's evidence demonstrated that Johnson withheld relevant information from his accountants. Under these circumstances, Johnson's alleged reliance on his accountants is irrelevant. Cf. *United States v. Signer*, 482 F.2d 394, 398 (6th Cir. 1973).

Even if we assume that reliance evidence is logically relevant to any issue in the case, our inquiry cannot end there. Under Federal Rule of Evidence 403, admissibility is predicated on more than mere logical relevance:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In determining legal relevance, the trial judge has broad discretion. *United States v. Moore*, 522 F.2d 1068, 1079 (9th Cir. 1975), cert. denied, 423 U.S. 1049, 96 S.Ct. 775, 46 L.Ed.2d 637 (1976). We may not disturb his ruling unless he has clearly abused his discretion. *United States v. Dwyer*, 539 F.2d 924, 927 (2d Cir. 1976).

No showing of abuse of discretion has been made here. Where reliance on the accountants was relevant, the district court allowed direct evidence on that point. Because it depends on a series of inferences, however, evidence of neglected deductions is only indirectly probative of reliance. Moreover, it carries several risks against which Rule 403 was designed to protect. It could have resulted in unfair prejudice to the government's case by appealing to the emotions of the jury. Indeed, the conduct of Johnson's counsel during the trial made this no small concern of the district court.[1] Also, the danger of confusing the issues was great because tax liability was irrelevant to the offenses for which Johnson was tried. Finally, presenting evidence of overpayment could have resulted in a

1 The district court repeatedly admonished Johnson's counsel for appealing to the sympathy of the jury in a manner unrelated to the merits of the case. The Court at one point sustained an objection to an attempt to elicit from Mr. Johnson information about his contributions to a religious school: "Counsel, I think you well know that attempts to evoke sympathy on the basis of religious activities is wholly improper to the merits of this case. You have repeatedly gone into this, notwithstanding the Court's rulings.". 1st Supp.Record Vol. IV, at 251. In his closing argument, Johnson's counsel noted that his client had gone to war for his government, "subjected himself to the enemy's bullets", and that now the same government had turned his life "into a nightmare". *Id.*, Vol. V, at 46. The district court was moved to comment to Johnson's counsel: "you were able to turn tears on and off like a faucet during your closing argument . . . if there can be such a thing as erudition in tears, you certainly displayed it". *Id.* at 163, 165. This comment occurred during the argument of post-trial motions, and thus *not* in the jury's presence.



waste of time on collateral issues. See 1st Supp.Record, Vol. III, at 308. We conclude that the district court properly excluded evidence of neglected tax deductions.

Johnson's second contention in this regard is that the district court erred in overruling his motion for a mistrial when the prosecutor, in his closing argument implied a tax liability on Johnson's part. Specifically, Johnson objected to the prosecutor's statements that improper business deductions were made "at the expense of the taxpayers of this country". See Tr.Pros.Arg. at 22. We do not agree that this expression implies a tax liability. But, however it is interpreted, any prejudicial effect that it might have had was cured by the district court's instruction to the jury: whether "a tax is due or owing by the defendant is immaterial to the charges before you in this case". The instruction continued:

> Accordingly, whether the Government has or has not suffered a pecuniary or monetary loss as a result of the alleged false return is not relevant and need not be considered by you in your deliberation.[2]

We have carefully examined Johnson's 12 other allegations of error and find them to be without merit.[3]

2 1st Supp.Record, Vol. V, at 103. We note also that in his closing argument Johnson's counsel stated: "But bear in mind, this case is not about any taxes that are alleged to be due by Mr. Johnson. No claim, you read these indictments, there is no claim for any amount of taxes". *Id.* at 41.

3 These assignments of error are as follows: (1) The trial court denied appellant's motion for pretrial discovery of corporate employees' and fiduciaries' grand jury testimony; (2) The trial

During oral argument, counsel for appellant stressed *United States v. Schilleci*, 545 F.2d 519 (5th Cir. 1977) as his strongest point. In *Schilleci* we held that, on the "unique factual situation presented", the combined effect of several errors required reversal of the convictions, even though none of the errors standing alone constituted grounds for reversal. *Id.* at 526. Because we have found no error in the instant case, *Schilleci*, with its emphasis on cumulative error, is not pertinent.

The judgment of conviction appealed from is

AFFIRMED.

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court denied appellant's motion to dismiss the superseding indictment; (3) The trial court denied appellant's motion for a temporary restraining order and permanent injunction against conducting an I.R.S. survey of prospective jurors; (4) The trial court denied appellant's motion to quash the general venire, to dismiss the indictment, and to proffer evidence in support of the motion [We had already decided this issue in *United States v. Horton*, 526 F.2d 884 (5th Cir. 1976) cert. denied, 429 U.S. 820, 97 S.Ct. 67, 50 L.Ed.2d 81]; (5) The trial court admitted evidence of acts outside the scope of the period in the indictment to prove system, pattern, motive, and intent; (6) The trial court allowed the jury to use a transcript of a tape recorded conversation for purposes of identifying speakers, not as evidence [We note that the procedure adopted by the trial court amply satisfied the requirements set out in *United States v. Onori*, 535 F.2d 938 (5th Cir. 1976)]; (7) The trial court allowed the entire tape recording to be played for the jury; (8) The trial court admitted two certified newspaper clippings to establish that certain events had occurred; (9) The trial court restricted cross-examination of government witnesses to matters within the scope of direct; (10) The trial court allowed the government to present evidence through a summary witness; (11) The trial court restricted cross-examination of the summary witness; (12) The trial court overruled appellant's motion for a new trial.



UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

October 17, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76-2447 — U.S.A. v. LEWIS E. JOHNSON

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing on behalf of appellant, Lewis E. Johnson, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
/s/ BRENDA M. HAUCK
Deputy Clerk

cc: Mr. James A. McPherson
Messrs. Gerald J. Gallinghouse
Cornelius R. Heusel
Robert N. Habans, Jr.
Mr. Stephen A. Mayo

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

November 2, 1977

Mr. James A. McPherson
Attorney
419 Carondelet St.
New Orleans, LA 70130

No. 76-2447 — USA v. Lewis E. Johnson

MANDATE STAYED TO AND INCLUDING
November 16, 1977
(SEE ORDER ENCLOSED)

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.



Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
/s/ SUSAN M. GRAVOIS
Deputy Clerk

enc.

cc: Mr. Cornelius R. Heusel
Mr. Robert N. Habans, Jr.
Mr. Stephen A. Mayo

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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76-2447

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LEWIS E. JOHNSON,
Defendant-Appellant.

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Appeal from the United States District Court for the Eastern District of Louisiana

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ORDER:

The motion of APPELLANT for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including November 16, 1977, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein,



unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Bryan Simpson
UNITED STATES CIRCUIT
JUDGE

---

*AFFIDAVIT*

UNITED STATES OF AMERICA )
STATE OF LOUISIANA ) ss.
PARISH OF ORLEANS )

BEFORE ME, the undersigned authority, personally came and appeared:

JAY C. ZAINEY,

who, being by me first duly sworn, deposed and said:

1. That in connection with the preparation for hearing of a Motion for a New Trial filed on behalf of the defendant in United States v. Lewis E. Johnson, Cr.Ac. No. 75-524, Section A(I), E.D.La., he met with Mrs. Janice K. Barden, Jury Commissioner for the Eastern District of Louisiana, on April 5, 1976 in Room 414 of the Louisiana Wildlife and Fisheries Building, 400 Royal Street, New Orleans, Louisiana, which houses the records of the United States District Court for the Eastern District of Louisiana with regard to matters concerning jury selection.

2. That Mrs. Barden, a statistician, has been the Jury Commissioner since the creation of that post and has taken samplings for statistical analysis with respect to at least the Master Jury Wheel of 1970 and 1973.

3. That in 1970, 22,130 names were put in the Master Jury Wheel, from which a random 500 names were drawn and statistically studied, yielding the following:

| | | |
|---|---|---|
| Persons Qualified | 234 | (46.8%) |
| Persons Not Qualified* | 266 | (53.2%) |
| Persons Excused | 159 | (31.8%) |
| Persons Exempt or Not Located | 107 | (21.4%) |
| One Man Business Exemptions | 14 | (2.8%) |

* "Not qualified" includes all exemptions

4. That in 1973, 20,122 names were put in the Master Jury Wheel, from which a random 500 names were drawn and statistically studied, yielding the following:

| | | |
|---|---|---|
| Persons Qualified | 251 | (50.2%) |
| Persons Unqualified | 249 | (49.8%) |
| Persons Excused | 200 | (40%) |
| Persons Exempt | 48 | (9.6%) |
| One Man Business Exemptions | 20 | (4%) |
| Not located | 1 | (0.2%) |

5. That Mrs. Barden advised affiant on one occasion about a contractor who had four to six employees



who was excused by the Court. Mrs. Barden could not definitively state that this person was excused for any reason other than a "one-man business" personal exemption.

6. That a request was made subsequent to the said interview for a copy of all Juror Qualification Questionnaires which demonstrated a claim of exemption for one man business operators, together with the Court's Order permitting their excuse, which evidence was denied unless subpoenaed by the Court.

7. The further investigation of the records of the Jury Commissioner, and the discovery and production of evidence supportive of defendant's Motion for a New Trial and the appeal from the denial of defendant's Motion to Dismiss Indictment is effectively foreclosed if the defendant is denied an evidentiary hearing and the corollary right to a subpoena of Mrs. Barden and a subpoena duces tecum for the production of all records relevant to this matter.

/s/ JAY C. ZAINEY
JAY C. ZAINEY

SWORN to and SUBSCRIBED
before me this 9th day
of April, 1976.

/s/ DAVID H. ALFORTISH
NOTARY PUBLIC

My Commission is Issued for Life.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

OFFICE OF THE CLERK

Nelson B. Jones
Clerk

400 Royal St., Rm. 306
New Orleans, La. 70130

Dear Prospective Juror:

Your name has been selected at random from the list of registered voters for prospective jury service in this Court.

The Jury Selection and Service Act of 1968 requires that the attached questionnaire be filled out and returned to the Clerk's office within 10 days. There is enclosed for your convenience in returning the questionnaire, a self-addressed envelope which requires no postage. Failure to do this within the 10 days will make you liable to be summoned to report to this office to execute said questionnaire, and failure, without good cause, to respond to such a summons could result in your being fined up to $100.00 or imprisoned up to 3 days in jail, or both. Misrepresentation in the questionnaire of any material fact requested, if made to secure or avoid jury service, may subject you to criminal penalties.

THIS IS NOT A SUMMONS for jury service. If you are later chosen for such service you will be notified to report at a stated time and place. Jurors will receive mileage and, unless they are Government employees, $20.00 per day for each day of service.



EXEMPTIONS — *The following persons are exempt from jury service:*

Active members of the Armed Services
Policemen and firemen.
Public officers, Federal, State, Parish or City.
Federal law enforcement officers.

EXCUSES — *The following persons will be excused by the Court upon individual request:*

Persons actively engaged in operating a one-man business.
Mothers with children under 10 years of age where there is no one else but the mother to care for them.
Lawyers, doctors, dentists and ministers of the Gospel when actively and regularly engaged in the practice of their profession.
Persons over 70 years of age.

*The following persons may be excused by the Court upon request and a proper explanation and/or doctor's certificate:*

Persons suffering from a disabling physical disability.
Persons suffering from a disabling mental disability.
Persons who would suffer an extreme hardship if required to serve.

Before anyone may be exempted or excused, however, the questionnaire must be answered in full and returned to this office.

If you are unable to fill out this form yourself you should have someone else fill it out for you, setting out the reason for such action.

Yours very truly,
/s/ NELSON B. JONES
NELSON B. JONES

# JUROR QUALIFICATION QUESTIONNAIRE

(1) IF YOUR NAME AND PERMANENT ADDRESS ARE NOT CORRECT, PLEASE CHECK ☐ AND SHOW CORRECTIONS ON REVERSE SIDE.

TO

(3) SHOW YOUR COUNTY →

(2) RETURN THIS FORM IN SELF-ADDRESSED ENVELOPE TO

**UNITED STATES DISTRICT COURT**

(4) HAVE YOU LIVED FOR THE FULL YEAR IN
- THIS STATE ☐YES ☐NO
- THE SAME COUNTY ☐YES ☐NO

→ IF "NO" GIVE NAMES OF OTHER COUNTIES OR STATES IN WHICH YOU LIVED DURING THE YEAR, AND SHOW DATES. (USE REVERSE IF NECESSARY.)

(5) PHONE { HOME / WORK

(6) BIRTH DATE { month | day | year

(7) AGE

(8) U.S. CITIZEN ☐YES ☐NO

(9) MR. ☐ MRS. ☐ MISS ☐

(10) ☐MARRIED ☐SINGLE ☐WIDOWED ☐DIVORCED/SEPARATED

(11) PLEASE INDICATE YOUR RACE ON THE FOLLOWING LIST

FEDERAL LAW REQUIRES YOU AS A PROSPECTIVE JUROR TO INDICATE YOUR RACE. THIS ANSWER IS REQUIRED SOLELY TO AVOID DISCRIMINATION IN JUROR SELECTION AND HAS ABSOLUTELY NO BEARING ON QUALIFICATIONS FOR JURY SERVICE. BY ANSWERING THIS QUESTION YOU HELP THE FEDERAL COURT CHECK AND OBSERVE THE JUROR SELECTION PROCESS SO THAT DISCRIMINATION CANNOT OCCUR. IN THIS WAY THE FEDERAL COURTS CAN FULFILL THE POLICY OF THE UNITED STATES WHICH IS TO PROVIDE JURORS WHO ARE RANDOMLY SELECTED FROM A FAIR CROSS SECTION OF THE COMMUNITY.

- ☐ INDIAN (American)
- ☐ ORIENTAL
- ☐ BLACK (or Negro)
- ☐ WHITE
- ☐ OTHER (Specify)

(12) CAN YOU ... THE ENGLISH LANGUAGE?
- READ ☐YES ☐NO
- WRITE ☐YES ☐NO
- SPEAK AND UNDERSTAND ☐YES ☐NO

(13) SHOW THE EXTENT OF YOUR EDUCATION BY GIVING THE NUMBER OF FULL YEARS COMPLETED { In Grade School ☐ | In High School ☐ | Trade/Vocational School ☐ | Above High School ☐

(14) DO YOU HAVE ANY PHYSICAL OR MENTAL INFIRMITY IMPAIRING YOUR CAPACITY TO SERVE AS JUROR? ☐YES ☐NO

IF "YES" PLEASE EXPLAIN (& attach evidence of your infirmity)

Federal Law requires that you answer No. 12, 13, 14, & 15 so that the Federal Courts may determine promptly whether you fall within an excuse or exemption category (See "E" & "F").

(15) ARE YOU NOW EMPLOYED? ☐YES ☐NO

(16) YOUR EMPLOYER'S NAME

(17) YOUR USUAL OCCUPATION, TRADE OR BUSINESS

(18) BUSINESS ADDRESS OR EMPLOYER'S ADDRESS

Street

City State

(19) WERE YOU EVER CONVICTED OF A STATE OR FEDERAL CRIME PUNISHABLE BY IMPRISONMENT FOR MORE THAN ONE YEAR? ☐YES ☐NO

(20) WERE YOUR CIVIL RIGHTS RESTORED? ☐YES ☐NO

(21) ARE ANY CHARGES PENDING AGAINST YOU FOR VIOLATION OF A STATE OR FEDERAL CRIME PUNISHABLE BY IMPRISONMENT FOR MORE THAN ONE YEAR? ☐YES ☐NO

(22) CHECK IF YOU ARE EMPLOYED ON A FULL-TIME BASIS AS ONE OF THESE
- ☐ PUBLIC OFFICIAL OF THE UNITED STATES, STATE, OR LOCAL GOVERNMENT WHO IS EITHER ELECTED TO PUBLIC OFFICE OR DIRECTLY APPOINTED BY ONE ELECTED TO OFFICE.
- ☐ MEMBER OF ANY GOVERNMENTAL POLICE OR REGULAR FIRE DEPT. (NOT INCLUDING VOLUNTEER OR COMMERCIAL DEPTS.)
- ☐ MEMBER IN ACTIVE SERVICE OF THE ARMED FORCES OF THE UNITED STATES.

YOU MAY BE EXCUSED BY THE COURT FROM SERVICE AS A JUROR IF YOU FALL WITHIN A CATEGORY LISTED HERE OR ON AN ENCLOSED PAPER. IF LIST IS HERE, MARK THAT EXCUSE WHICH APPLIES TO YOU. IF YOU DEMAND TO BE EXCUSED FOR THAT REASON. (IF LIST OF EXCUSES APPEARS ON ENCLOSED SHEET FOLLOW INSTRUCTIONS THERE.)

I SWEAR AND AFFIRM THAT ALL ANSWERS ARE TRUE TO THE BEST OF MY KNOWLEDGE & BELIEF

SIGN HERE ▶ _____ DATE SIGNED _____

If another person filled out the above form, please indicate your name, address and reason why on other side of form.

PLEASE CHECK TO MAKE CERTAIN YOU HAVE ANSWERED ALL APPLICABLE QUESTIONS.



## UNITED STATES DISTRICT COURT

PLEASE NOTE: Unless shown elsewhere, the address of the U.S. Court which sent you this questionnaire is shown in the top right corner on reverse side.

Dear Prospective Juror:

Your name has been drawn by lot and you are being considered for jury service in the United States District Court. Trial by jury is a keystone of our system of justice. Jury service is therefore both an opportunity and an obligation of every American. Jurors will receive mileage and, unless they are Federal Government employees, $20.00 per day for each day of service.

*This is not a summons for jury service.* It is a way of obtaining some information about you from which we can determine whether you are qualified to serve. Please answer each question, sign and return the form within ten days. If we find you qualified, you may be summoned at a later date.

If you are unable to fill out this form, someone else may do it for you provided that person indicates below why it was necessary for him to do it instead of you.

If you do not return this questionnaire form within ten days you are liable to be summoned to report at your expense for completion of the questionnaire at this office.

There are certain grounds for excuse or exemption from jury service. If you are exempt or claim a right to

be excused, give us that information under sections E. and F. If you show under section C. that you have a physical or mental infirmity, please attach a letter from your doctor, if possible. *Do not ask to be excused by telephone.*

If your address changes after you have returned this questionnaire, please notify us promptly by letter.

CLERK,
UNITED STATES DISTRICT
COURT

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JOSEPH N. TRAIGLE
Post Office Box 201
Baton Rouge, Louisiana 70821

March 13, 1976

We have surveyed the records of the state of Louisiana and find the following.

It is estimated that 46,200 sole proprietorship type businesses exist in the district composed of the following parishes: Orleans, Jefferson, St. Bernard, Plaquemines, St. Tammany, Washington, St. James, St. John, St. Charles, Tangipahoe, Terrebonne, Lafourche.

Joseph N. Traigle
Collector of Revenue
State of Louisiana
/s/ JOSEPH N. TRAIGLE

Supreme Court, U. S.
FILED
FEB 10 1978
MICHAEL RODAK, JR., CLERK

No. 77-746

# In the Supreme Court of the United States

OCTOBER TERM, 1977

LEWIS E. JOHNSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

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No. 77-746

LEWIS E. JOHNSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks review of his convictions for filing false income tax returns on the grounds that the trial court erred in permitting the operators of one-man businesses to be excused from the grand jury and the trial jury and that it erred in excluding evidence of petitioner's failure to claim certain alleged deductions on the tax returns.

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on three counts of filing false corporate income tax returns for two corporations that he controlled, in violation of 26 U.S.C. 7206(1) (Pet. App. 2a). The trial court imposed concurrent sentences of imprisonment of a year and a day on each count. The court of appeals affirmed (Pet. App. 1a-8a).

1. Petitioner first argues (Pet. 5, 20-26) that the district court's plan for selection of grand and petit juries was improper because it permitted prospective jurors to be excused, upon their request, if they were the operators of one-man businesses (Pet. App. 17a). This claim was waived by petitioner's failure to raise it in timely fashion. On January 16, 1976, the court set trial in the case for Monday, March 15, 1976. It was not until Friday, March 12, 1976, one working day before trial, that petitioner first made his motions to dismiss the indictment and to quash the general venire on this ground. The trial court properly found that these motions were not timely under Rule 12 of the Federal Rules of Criminal Procedure. The challenges were also untimely under the provisions of the Jury Selection and Service Act. See 28 U.S.C. 1867(a).

At all events, petitioner's claim has no merit. The local plan for the selection of federal juries in the Eastern District of Louisiana permits operators of one-man businesses to be excused upon individual request (Pet. App. 17a). That provision does not make such persons "a cognizable class systematically excluded from petit juries." *United States* v. *Horton*, 526 F. 2d 884, 889 (C.A. 5), certiorari denied, 429 U.S. 820, and cases cited therein. Indeed, under *Horton*, the categorical exclusion of certain occupational groups from jury duty, even if it existed, would be permissible "on the 'bona fide ground that it [is] for the good of the community that their regular work should not be interrupted.'" *Government of the Canal Zone* v. *Scott*, 502 F. 2d 566, 569 (C.A. 5), quoting from *Rawlins* v. *Georgia*, 201 U.S. 638, 640. The exclusion of sole proprietors from jury duty upon request meets that standard.



Moreover, the Jury Selection and Service Act of 1968, 28 U.S. 1861 *et seq.*, refutes petitioner's claim. Section 1863(b)(5) provides that each district court may "specify those groups of persons or occupational classes whose members shall on individual request therefor, be excused from jury service." The statute further states that "[s]uch groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof * * *." See S. Rep. No. 891, 90th Cong., 1st Sess. 28 (1967); H.R. Rep. No. 1076, 90th Cong., 2d Sess. 10-11 (1968). See also *United States* v. *Grey*, 355 F. Supp. 529, 531-532 (W.D. Okla.). Indeed, a provision in jury selection plans for the excusing of sole proprietors is common. *United States* v. *Gurney*, 393 F. Supp. 688, 705 (M.D. Fla.) ("plans of at least thirty districts * * * provide for the granting of excuses to sole proprietors").[1]

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[1] *Labat* v. *Bennett*, 365 F. 2d 698 (C.A. 5), upon which petitioner relies (Pet. 21-23), does not support his claim. That case turned upon the systematic exclusion of blacks from juries and only peripherally upon the exclusion of daily wage earners. Moreover, even with respect to daily wage earners, the decision emphasized: (1) the fact that such an exclusion operated to exclude 47% of all black workers in the parish from jury duty, and (2) the fact that there was no statutory authority for the exemption of such wage earners as a class (365 F. 2d at 720). Here, however, petitioner makes no claim of racial exclusion.

*Peters* v. *Kiff*, 407 U.S. 493, also relied upon by petitioner (Pet. 21, 23), is wholly distinguishable. There, the Court held that a white defendant had standing to challenge the selection of state grand and petit juries, who indicted and convicted him, on the ground that blacks were systematically excluded from those bodies. The present case involves no issue of petitioner's standing to challenge the selection of the juries that indicted and convicted him.

2. Petitioner further argues (Pet. 8-9, 26-34) that the trial court erred in excluding evidence of his failure to claim certain alleged deductions on the tax returns. But as the court of appeals properly pointed out (Pet. App. 3a), petitioner was tried only for willfully making false statements on his corporations' tax returns, so that the correct amount of his tax liability was irrelevant. See, *e.g.*, *Schepps* v. *United States*, 395 F. 2d 749 (C.A. 5), certiorari denied, 393 U.S. 925; *Siravo* v. *United States*, 377 F. 2d 469 (C.A. 1); *Silverstein* v. *United States*, 377 F. 2d 269 (C.A. 1); *Hoover* v. *United States*, 358 F. 2d 87 (C.A. 5), certiorari denied, 385 U.S. 822; cf. *United States* v. *Fritz*, 481 F. 2d 644 (C.A. 9); *United States* v. *Jernigan*, 411 F. 2d 471 (C.A. 5), certiorari denied, 396 U.S. 927.

Moreover, petitioner's claimed defense that he relied upon his accountants was properly rejected by the trial judge, since the record shows that he withheld relevant information from his accountants (Pet. App. 5a). Thus, the trial judge did not abuse his discretion in excluding evidence of petitioner's purported reliance upon his accountants, it being reasonable to conclude that the probative value of such evidence was outweighed by the "danger of unfair prejudice, confusion of the issues, or misleading the jury * * *." Fed. R. Evid. 403. At all events, as the court of appeals recognized (Pet. App. 6a), "[w]here reliance on the accountants was relevant, the district court allowed direct evidence on that point."[2]

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[2]Petitioner also argues (Pet. 31) that in his closing argument to the jury the prosecutor unfairly characterized him as a tax evader. But the court of appeals correctly held that "any prejudicial effect that it might have had was cured by the district court's instruction to the jury: whether 'a tax is due or owing by the defendant is immaterial to the charges before you in this case' " (Pet. App. 7a).



It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
*Solicitor General.*

FEBRUARY 1978.

DOJ-1978-02